

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of William E. Stolberg, Deceased.

DONALD W. STOLBERG,

Plaintiff-Appellant,

v

ANN B. STOLBERG,

Defendant-Appellee.

UNPUBLISHED

November 22, 2002

No. 226471

Oakland Probate Court

LC No. 99-267772-CZ

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

This case arises out of plaintiff Donald W. Stolberg's allegations that his daughter, defendant Ann B. Stolberg, improperly kept certain stocks plaintiff's father had transferred to her before his death. Plaintiff appeals as of right the granting of judgment in favor of defendant, as well as the order denying plaintiff's motion to reopen proofs, the grant of costs to defendant, and the order denying reconsideration. We affirm.

Plaintiff's first issue on appeal is that the court abused its discretion by not allowing an expert witness to testify about the deceased's dementia. The admissibility of expert witness testimony is within the court's discretion and is reviewed for abuse of that discretion. *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). An abuse of discretion will be found only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Generally, all relevant evidence is admissible. MRE 402. Relevant evidence is evidence that is material and probative, meaning that the evidence is logically relevant to, and has any tendency to prove, an issue or fact of consequence at trial. MRE 401. Expert witness testimony is admissible if the court determines it will assist the factfinder to understand the evidence or determine a fact at issue. MRE 702. The critical question is whether the testimony will aid the factfinder in making the ultimate decision in the case. *King v Taylor Chrysler-Plymouth, Inc.*, 184 Mich App 204, 215; 457 NW2d 42 (1990). Testimony that is purely speculative should be excluded. *Phillips, supra* at 402.

First, it should be noted that plaintiff's expert never met or examined the deceased. The expert's opinion was based solely on medical records. Plaintiff was allowed to extensively examine the expert witness about the possibility that the deceased had dementia between 1994 and 1997, the only time period that the witness had medical records to review and the only time period that plaintiff alleged there was dementia. In fact, the witness testified that with regard to the deceased's condition in 1994, based on a review of the medical records "there was only an indication of either no dementia or a very early stage of dementia that caused little impairment in his cognition and judgment - ." However, the deceased made the gift to defendant in 1993. The court properly excluded testimony about the possibility of the deceased's dementia in 1993 because the witness did not have medical records for that year, and, importantly, plaintiff repeatedly admitted that the testimony was not relevant. Thus, the court properly excluded testimony that was purely speculative and irrelevant.

Plaintiff's second issue on appeal is that the court abused its discretion by not allowing defendant to be questioned about her disinheritance. The court has the discretion to control the questioning of witnesses and the scope of cross-examination; therefore, its decision is reviewed for abuse of that discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999).

The court had the responsibility to control the arguments of counsel and to limit them to relevant and material matters. *Tobin v Providence Hosp*, 244 Mich App 626, 640; 624 NW2d 548 (2001); MRE 402. While evidence of bias or prejudice is always relevant, *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000), defendant's possible knowledge about the 1990 disinheritance of the deceased's grandchildren was collateral and had no tendency to prove whether the stock transfer was a contract or gift in 1993. Therefore, the court properly limited the testimony.

Plaintiff's third issue on appeal is that the court improperly denied the motion to reopen proofs. The decision to reopen proofs is within the discretion of the trial court; therefore, the decision is reviewed for abuse of that discretion. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959).

To determine whether proofs should be reopened, a court must consider whether there would be prejudice to the defendant, undue advantage to the plaintiff, or inconvenience to the court or parties. *Bonner, supra* at 541. Further, the court should evaluate the merit of the request and the reasonable diligence used in obtaining the evidence. *Cowan v Anderson*, 184 Mich 649, 656; 151 NW 608 (1915).

After the trial ended, plaintiff requested the court reopen proofs to allow the testimony of a witness; however, the witness had no firsthand knowledge. Because the witness had no firsthand knowledge, the testimony was of little, if any, merit. *Cowan, supra* at 656. Further, the trial was concluded. Cf *Kornicks v Lindy's Supermarket*, 24 Mich App 668, 672; 180 NW2d 847 (1970) (it was an abuse of discretion to deny the plaintiff's motion to reopen proofs when the plaintiff had rested, but the defendant had not presented its case yet). Reopening proofs would have prejudiced defendant and caused considerable inconvenience for defendant and the court.

Importantly, plaintiff was provided adequate opportunity to present witnesses at trial. If plaintiff had used reasonable diligence, the witness could have been discovered before trial. We

find the court properly denied the motion to reopen proofs because the witness had no firsthand knowledge about the issue, and the prejudice to defendant and inconvenience to defendant and the court substantially outweighed any limited value of the witness' testimony.

Plaintiff's fourth issue on appeal is that the court erred in ruling that the stocks were a gift rather than a temporary transfer to defendant. A probate court's findings of fact will not be reversed unless clearly erroneous. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

We note that the trial court gave extraordinary latitude to the attorneys and showed amazing patience as the parties and the attorneys spent valuable court time bickering and trading barbs. This Court defers to the probate court on matters of witness credibility and gives broad deference to findings made by the probate court because of its unique vantage point regarding witnesses and their testimony. *Erickson, supra* at 331. The court heard no testimony, other than plaintiff's allegations, that the stock transfer was not a gift. In contrast, the testimony of the stockbroker who handled the transfer supported defendant's claim that the stock was a gift. The stockbroker testified that at the time of the transfer, plaintiff's father appeared to be lucid. Further, the stock was put in an account solely in defendant's name. See *Osius v Dingell*, 375 Mich 605, 612; 134 NW2d 657 (1965) (stock was registered in the name of the plaintiff and defendant, supporting the argument that the stock was not a gift). There was also testimony that defendant cared for the deceased's second wife, supporting defendant's argument that the stock transfer was a gift in exchange for the care she had given. We find the court's decision that the stock transfer was a gift was not clearly erroneous because it was based on the evidence and the law.

Plaintiff's fifth issue on appeal is that the court abused its discretion by awarding costs to defendant after plaintiff was forced to cancel certain depositions. It is within the court's discretion to award costs; therefore, the court's decision is reviewed for abuse of that discretion. *Magnuson v Zadrozny*, 195 Mich App 581, 588-589; 491 NW2d 258 (1992).

Courts have inherent authority to impose sanctions based on the conduct of a party or attorney. *Persichini, supra* at 638-640. Further, "[i]f the party giving the notice of the taking of a deposition fails to attend and proceed with the deposition and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the reasonable expenses incurred in attending, including reasonable attorney fees." MCR 2.306(G)(1).

At a hearing, plaintiff's counsel testified regarding why he canceled the depositions. Importantly, canceling a deposition before the opposing party physically arrives at the site of the deposition does not alleviate the responsibility to pay for costs incurred in attempting to attend the deposition. See *Magnuson, supra* at 589. The trial court assessed the validity of plaintiff's counsel's explanation, found it lacking, and exercised its inherent authority to impose sanctions. *Persichini, supra* at 638-640. We find no abuse of discretion with the trial court's award of defense counsel's travel costs.

Moreover, because plaintiff's motion to remove defense counsel was meritless, the court properly awarded defense counsel's travel costs for having to attend the motion. On the other

hand, plaintiff's counsel was properly denied costs for filing a motion to reschedule the depositions because the court rejected plaintiff's reason for canceling the first set of depositions. MCR 2.313(A)(5)(a).

Plaintiff's sixth issue on appeal is that the court abused its discretion when it denied plaintiff's motion for reconsideration. A court's decision to deny a motion for reconsideration is reviewed for abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Generally, a motion for reconsideration that merely presents the same issues ruled on by the court will not be granted. MCR 2.119(F)(3). The party moving for reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id.*

Because plaintiff's counsel raised the same issues in the motion for reconsideration and did not demonstrate that palpable error was made, the trial court did not abuse its discretion in denying the motion for reconsideration. MCR 2.119(F)(3); *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) (it was not an abuse of discretion to deny a motion based on a legal theory and facts that could have been pleaded or argued before the original order).

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter